No. 270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923 1925

EASTMAN KODAK COMPANY OF NEW YORK,
Petitioner,

vs.

SOUTHERN PHOTO MATERIAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

Daniel MacDougald,
J. A. Fowler,
Attorneys for Respondent.

JOHNSON-DALLIS CO., ATLANTA, GA.

IN THE

Supreme Court of the United States

EASTMAN KODAK COMPANY OF NEW YORK, Petitioner, vs. SOUTHERN PHOTO MATERIAL COMPANY, Respondent.	Petition for Writ of Certiorari, to the United States Circuit Court of Appeals, Fifth Circuit.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

Now comes the Southern Photo Material Company, in response to the petition for Writ of Certiorari, and respectfully showeth to the Court as follows:

I.

The above case is one in which the writ of certiorari should not issue, for that it is quite clear that the judgment of the Court of Appeals in this case is not made final by Statute.

II.

The writ of certiorari should not issue, for that the Circuit Court of Appeals committed no error prejudicial to petitioner in the judgment rendered by it.

III.

The questions raised are wholly free from doubt and do not warrant the issuance of the writ.

In view of the fact that the petitioner has obtained a writ of error in this case, we will not burden the Court with a response going into the merits of the case, but will, by a motion to dismiss the writ of error and to affirm the decision of the Court of Appeals, call the Court's attention to the fact that the venue of the suit was based upon Section 12 of the Clayton Act, (38 Stat. 736) in the District where the respondent (defendant in the District Court) transacted business and service had in the District of which it was an inhabitant. The record discloses that respondent transacted an extensive interstate business in the State of Georgia and Northern District, having 126 dealers who were its customers, (pages 752 to 756 of the record) and one professional stock house in the city of Atlanta that handled petitioner's line exclusively, and furthermore, did an extensive local business by resident demonstrators. (Pages 774 and 775 of the record).

That the venue was propery laid is evidenced from an inspection of Section 12 of the Clayton Act. See the case of Frey & Sons vs. Cudahy Packing Co., 228 Fed. 209.

That this is true is recognized by this Honorable Court in the case of General Investment Company vs. Lakeshore, Adv. Op. 67 Law Ed. 115.

The rule of substantive law sought to be invoked is without merit, for that the record shows that the respondent was not in pari delicto.

The particular act of the petitioner in creating and extending the scope of its monoply, directed towards re-

spondent and out of which the respondent's damage grew, was the refusal of the petitioner to sell to respondent the merchandise upon which it held a monopoly after petitioner had purchased the two competing stock houses in the city of Atlanta (pages 165 to 169 of the record), although respondent had had an established trade upon such articles, and had for ten years purchased such goods from petitioner, and independent concerns subsequently acquired by petitioner (pages 149 and 150 of the record) and the business of the respondent had increased with petitioner from year to year, (page 212 of the record) and the respondent had discounted its bills with petitioner each and every month of this period. (Page 171 of the record).

To purchase goods from the only available source does not create an illegal relationship, even though the vendor be engaged in creating an illegal monoply.

Conolly vs. Union Pipe Co., 184 U. S. 540.

Wilder Mfg. Co. vs. Corn Products Co., 236 U. S. 165.

To do business with an illegal monoply upon the only terms and conditions permitted (page 171 of the record and pages 179 to 181) does not create an illegal relationship.

Chas. A. Ramsey vs. Associated Bill Posters.

W. H. Rankin Co. vs. same defendant.

(Decided on January 2nd, 1923, Adv. Opinion, L. Co-op., 67 L. Ed., page 208).

Thus we respectfully submit the qestions raised by petitioner are frivolous and entirely without merit, both on the question of venue and the supposed application of the doctrine of pari delicto.

Respectfully submitted,

DANIEL MacDOUGALD,
J. A. FOWLER,
Attorneys for Respondent.

IN THE

Supreme Court of the United States

NO. 270. 31 6

EASTMAN KODAK COMPANY OF NEW YORK,
Plaintiff-in-Error,

against

SOUTHERN PHOTO MATERIAL COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

KING, SPALDING, MACDOUGALD & SIBLEY,
FOWLER & FOWLER,
Attorneys For Defendant-in-Error.

J. A. FOWLER,
DANIEL MACDOUGALD,
Of Counsel.

JOHNSON-DALLIS CO., ATLANTA, GA.

INDEX.

TABLE OF CASES

Supreme Court of the United States

October Term, 1924

EASTMAN KODAK COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
SOTHERN PHOTO MATERIAL CO.,
Defendant in Error,

No. 270

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The Southern Photo Material Company (hereinafter called the plaintiff) brought suit against the Eastman Kodak Company (hereniafter referred to as the defendant) to recover damages for an injury to its business caused by the defendant's violation of the Act of July 2, 1890, known as the Sherman Anti-Trust Act.

Suit was predicated on Sections 1 and 2 of that Act, and sought to recover triple damages, as provided in Section 7.

The venue of the suit was based upon Section 12 of the Clayton Act (38 Statutes, 736), in the district where the defendant transacted business, and service was had in the district of which it was an inhabitant.

A traverse of the service and plea to the jurisdiction were overruled. The case proceeded to trial and resulted in a verdict and judgment for the plaintiff, which was affirmed by the Circuit Court of Appeals for the Fifth Circuit. (295 Fed., page 98).

The case is before this honorable court on writ of error.

I.

STATEMENT OF FACTS.

The petition charged that the defendant had illegally monopolized interstate trade in photographic supplies and material, consisting of cameras, films, plates and photographic paper and that this monoply covered 75% to 80% of the entire photographic trade in the United States.

That this monopoly was brought about by wrongful contracts with regard to raw paper stock which prevented the trade from obtaining such stock, by acquiring competing Plants, businesses and Stock Houses, dismantling acquired Plants and restraining the vendors from re-entering the business and imposing on photographic dealers arbitrary and oppressive terms of sale and other regulations inconsistent with fair and free dealing and arbitrarily enforcing the same by a system of espionage and the keeping of records of violations with the view of penalizing the dealer by forfeiting a large part of the dealer's discount, or discontinue selling such dealer for violation of any of these arbitrary regulations.

The petition set forth in detail the numerous transactions of the nature and class herein designated.

The petition further charged that the defendant had not only acquired a monopoly in the manufacture and sale from its Plant of photographic supplies and materials but that the defendant had acquired a complete monopoly in the distribution of amateur photographic supplies, consisting of cameras and films and in addition thereto was attempting to extend its monopoly to the distribution of professional photographic apparatus and supplies to professional pho-

tographers by the acquisition of professional Stock Houses and the elimination of competitors of such acquired Stock Houses. To so monopolize the distribution to professional photographers would eliminate potential competition. That as a part of this illegal plan and conspiracy, the defendant had purchased twenty competing Stock Houses in the important cities of the United States, and had purchased two Stock Houses in the city of Atlanta which were the only local competitors of the plaintiff, and then purchased the only Stock House at New Orleans, another competitor of the plaintiff, and had attempted to purchase the business of the plaintiff, but when the plaintiff refused to sell, hired the plaintiff's traveling salesman, its bookkeeper, who was its confidential man, and its stock man and manager of the store.

That the defendant consolidated the two Stock Houses purchased in Atlanta, continuing the consolidated business under the name of the Glenn Photo Stock Company, a Georgia Corporation, that thereupon the defendant refused to sell the plaintiff its photographic supplies and materials, except at the same prices that photographers could purchase these goods from the Glenn Photo Stock Company.

That the refusal to sell to the plaintiff was a part and parcel of the defendant's illegal plan and conspiracy to monopolize the trade in photographic supplies.

That by reason of this refusal to sell to the plaintiff on the part of the defendant, the plaintiff was unable to supply its established trade with useful and necessary articles used by such photographers, as these products could not be obtained elsewhere because of the defendant's monopoly of such products and that the plaintiff lost the income to its established business of the profits on such sales so lost to it.

The defendant denied that it was an illegal monopoly,

denied that it had discontinued selling the plaintiff with an illegal purpose but merely refused to sell the plaintiff by virtue of its right to select its customers and by amendment set up that the plaintiff discontinued handling the defendant's line. The defendant also contended that the plaitiff was in pari delicto and could not recover, even though the defendant had created an illegal monopoly and had illegally refused to sell the plaintiff, thereby causing the plaintiff damage.

The defendant further contended that the plaintiff had sustained no damage by reason of its inability to obtain the Eastman goods.

All these issues were submitted to the Jury.

The assignments of error, while numerous and verbose present but few questions which rapidly dissolve in the face of the evidence.

EVIDENCE.

As provided in Section 5 of the Clayton Act, the decree in the Government case was introduced in evidence and the record upon which said decree was rendered was likewise introduced in evidence.

The record consisted of:

Government Petition,

The answer of the defendant in that case,

The opinion of Judge Hazel,

The final decree in that case,

The solemn admission in Court that the appeal to the Supreme Court in that case had been withdrawn from that Court by the defendant.

The final decree following the withdrawl of the appeal.

The plaintiff's petition was an exact replica of the Government suit in so far as the charge relating to the nature and extent of the monopoly and the method and acts by which same was created. It is well to note that in the Government petition, the purchase of the two Stock Houses in Atlanta and the one at New Orleans, and the operation by the defendant of the Glenn Photo Stock Company were charged as done in execution of the plan and conspiracy to create the illegal monopoly and such was found to be the fact by Judge Hazel.

The defendant introduced no evidence to rebut this evidence or to support its denial of having created an illegal monopoly and went to the Jury admitting that it had il-

legally conspired to and had illegally monopolized the trade in photographic supplies.

Plaintiff operated what is known as a Photographic Stock House, selling photographic supplies to professional photographers and advanced amateurs, soliciting orders from such photographers through traveling salsemen and by mail, in the Southern States. It commenced business in 1901 with a complete line of such merchandise. Its business was located on Central Avenue, near the Union Depot. The plaintiff manufactured mounts, but all the other articles, constituting professional supplies and apparatus were purchased from other manufacturers. It placed a large order with the Eastman Kodak Company and continued to thereafter deal with the Eastman Kodak Company until April, 1910, when the Eastman Kodak Company withdrew all discounts and refused to sell the plaintiff any goods, other than at the same prices that these goods were sold to the professional photographers, in other words, at the same price at which professional photographers could purchase goods form the Glenn Photo Stock Company, the Eastman owned house.

At the time the plaintiff placed its initial order with the Eastman Kodak Company, this concern declined to fill the order until their representative had called on the plaintiff and explained the method of doing business by this Company and this representative gave the plaintiff the option of purchasing goods under these methods or doing without them. (Pages 175 to 179 of the record.)

Then it was that the plaintiff encountered "The terms of sale." Under these terms of sale, the purchaser was prohibited from selling competing goods to photographers and was absolutely prohibited from selling Eastman goods to a dealer for resale.

The plaintiff when it started business, purchased goods

from a number of other Manufacturers whose merchandise did not then compete with the defendant.

These concerns were:

Taprell Loomis & Company,

Stanley Dry Plate Company,

Standard Dry Plate Company,

Seed Dry Plate Company,

Rochester Optical Company,

Falmer & Swing Company,

Century Camera Company.

These concerns were subsequently acquired by the Eastman Kodak Company. The plaintiff continued to purchase goods from these Manufacturers, from the time it commenced business until these concerns were acquired by the Eastman Kodak Company and then from the defendant up to and until the refusal of the defendant to longer sell the plaintiff in 1910. Thereafter plaintiff could not secure such products from anyone. (Pages 149 and 150 of the record.)

The plaintiff discounted its bills with the defendant each and every month from 1901 to April, 1910. (Page 171 of the record.) The business of the plaintiff was well organized and in competent and energetic hands. It was increasing from year to year, despite the limitations placed thereon by the defendant under the terms of sale.

Its business increased from year to year with the plaintiff up through 1907. There was a slight falling off in the volume of its business in 1908 and 1909. (Page 212 of the record.) This falling off in business was due entirely to the restrictions imposed on the plaintiff by the defendant.

The explanation of this loss and an illustration of the restrictions imposed upon the defendant is as follows:

There had been a complete change in the character of photographic paper used by professional photographers. The process changed from a printing out paper to a developing out paper, the former a daylight process, the other a gas light process, which could be carried on either at night or day.

The Artura Paper Company was the originator of the new process paper, and had absorbed the market for high and medium grade portrait work. The paper was known as Artura.

The Eastman Kodak Company successfully produced a developing out paper of a cheap grade for use in the cheaper studios, known as Azo paper, but utterly failed to produce such a paper for portrait work in medium or high grade studios.

The Eastman Kodak Company undertook to force the trade to use the old type paper in its portrait work and prohibited the dealers, among them the plaintiff, from purchasing this new paper from the manufacturer. The result of this is apparent from the following figures of sales by the plaintiff of the old process Eastman paper for high grade work in 1907, 1909 and 1910:

NAME OF PAPER.	1907.	1909.	3 mos. of 1910.
Aristo Platino	$ 9,308.95	$2,985.25	$402.70
Aristo, Jr.	618.18	372.20	40.40
Angelo Platino	743.56	678.75	45.15
Self-Toning	140.35	20.90	2.09
American Platinum	400.16	327.55	10.83
Aristo Gold	335.12	208.95	36.59
Collodion Carbon	128.62	107.70	9.80
TOTAL	$11,674.94	$4,701.30	$547.56

(Pages 184 and 185 of the record.)

As a contrast the sales of the Eastman cheap developing paper known as Azo by the plaintiff were:

1907.	1909.	3 mos. of 1910.
$3,933.30	$6,991.70	$2,904.53

The Artura Paper Company offered the plaintiff the exclusive agency for this paper on December 12th, 1907, in North Carolina, South Carolina, Tennessee, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas and Texas, at a 40 per cent. discount, and renewed the offer in 1908. (Pages 181 and 182 of the record.) Although this new process paper had knocked the old process paper out of the market (Page 184 of the record), the plaintiff could not handle this paper on account of the terms of sale.

The Artura Company opened its stock house in Atlanta and plaintiff could not compete for this business. Artura was a success. The inevitable result happened.

The Eastman Kodak Company acquired the Artura Plant in January, 1910, and dismantled same, but continued the manufacture of this product. In three months of 1910, the plaintiff handled $3,802.20 of this paper.

The Eastman discount allowed the plaintiff on this paper was 33 1-3 per cent. (Page 192 of the record.) This was 7 per cent. less than the independent factory offered to the plaintiff.

That the plaintiff was a competent, efficient merchant is further evidenced by letter of Eastman Kodak Company to the plaintiff, December 16th, 1909, (Pages 171 and 172 of the record) in which they announced the purchase of the Artura Factory and that the usual discount would be 25%, but the plaintiff would receive 33 1-3% because he was

among the limited dealers "who send out and get the business."

Up until the beginning of 1910, the plaintiff's business was confined exclusively to the sale of photographic supplies to professional photographers. It had four salesmen covering the Southern States, but could not sell to dealers because of the terms of sale (Page 150 of the record), although it had the organiganization and facilities.

Plaintiff in the early part of 1910, shortly after the defendant purchased the two Stock Houses in Atlanta, took over the Branch of the Ansco Company in Atlanta, and acquired a line of amateur goods, that is, cameras and films, for sale to dealers. This business did not conflict at all with the sale to professional photographers, but would supplement the business of the plaintiff. There was but slight additional expense in taking on this line or to sell a dealer in a town where the salesmen had gone to solicit from the professional photographer. The gross discount was only 10%. (R 300).

At this time, the plaintiff had a well rounded business. He had a complete line to sell to professional photographers. (Page 151 of the record.) and a complete line of amateur goods to sell to side line houses.

The defendant refused to deal longer with the plaintiff and the refusal is in writing. (See pages 165 to 169 of the record.)

Defendant refused to sell the plaintiff any of its products, even refusing to sell Artura paper or Stanley, Standard or Seed Plates, even though the plates were unrestricted and it had just acquired Artura Paper (Page 169 of the record.)

Defendant refused to accept any orders from the plaintiff

except at retail prices and wrote a customer of the plaintiff who had sent in an order direct, that the order could be filled from the Glenn Photo Stock Company. (Page 170 of the record.)

The refusal of the Eastman Company to longer sell the plaintiff had no effect on the plaintiff's sale of amateur goods, such as Kodaks and films to side line houses, because Eastman never permitted the sale of such goods to dealers. The refusal of the defendant to sell the plaintiff only affected the plaintiff's business with professional photographers.

As a result of the defendant's refusal to deal with the plaintiff, the plaintiff's line of professional supplies was shot to pieces. Thereafter plaintiff could supply not more than 50% in value of the initial equiment of a high grade Studio and 25% in value of the initial equipment of a cheap or medium grade studio and of the supplies consumed by such professional photographers in the operation of their business, could supply not over 25% in value of such supplies. (Page 301 of the record.)

The articles of merchandise which the plaintiff could not thereafter supply were in general use by photographers and continued so throughout the period covered by this suit. (Page 190 of the record.) The plaintiff still had and had for ten years prior thereto an established trade in such articles, but such trade on such articles and the profits resulting therefrom were utterly lost to the plaintiff. These articles were detailed at length in the evidence, as well as the business done by petitioner in these articles year by year for four years preceding the time Eastman cut the plaintiff off as a dealer. (See pages 184 to 189 of the record.)

The evidence shows in detail the organization of the plaintiff's business. (See pages 186 and 187 of the record.) That the plaintiff had the experience, the capacity, the organiza-

tion and the trade established, but could not obtain these necessary articles because of the defendant's refusal to sell to the plaintiff, this refusal had this result, because the defendant had secured a monopoly of such articles. That plaintiff's business during the period of the suit was operated at 50% of its capacity (Page 305 of the record) and that these articles upon which plaintiff had an established trade, but could no longer supply, could have been handled through this established business at no additional cost, other than the handling cost on such articles and this cost was 5% of the selling price of such articles. The items of cost incident to handling these goods through the established business was also shown. (Page 191 of the record.)

The gross discounts or gross profits formerly realized by the plaintiff on these articles were shown. (See pages 184 to 189 and pages 214-5 of the record.)

No additional overhead, organization, administrative or selling expenses would be incurred in handling a complete line over an incomplete line. (Page 191 of the record.)

Plaintiff's situation, due to the refusal of the defendant to longer sell to it and the monopoly held by the defendant had completely changed. Plaintiff could no longer secure a complete line of professional photographic supplies and apparatus. It had all the expense and the requisite organization to handle a complete line, but could in fact only offer for sale and take orders upon a few limited articles.

A detailed statement of the commodities which the plaintiff could no longer secure and the previous sales, gross profit, and net loss, based on such sales after allowing 5% handling charge, is as follows:

Artura Paper—1910 Sales—4 months, $3802.20—discount 25 and 10—gross profit $1267.40.		
Net loss for 4 months $1077.30.		
Net loss for one year	$3231.90	
Net loss for 4 years and 9 months		$15,351.52
Azo Paper—1909 Sales $6991.70, 1907 sales $3933.30, 4 months 1910 $2904-.53, gross profit 25%.		
Net loss for 1 year	1398.34	
Net loss for 4 years and 9 months		6,642.11
Bromides—1909 Sales—$60.78, 25%.		
Net loss for 1 year	14.24	
Net loss for 4 years and 9 months		67.64
Kresko Paper—1909 Sales—$938.90. Gross profit 25%.		
Net loss for 1 year	187.78	
Net loss for 4 years and 9 months		891.94
Solio Paper — 1909 Sales — $684.76. Gross profit 25%.		
Net loss for 1 year	136.96	
Net loss for 4 years and 9 months		650.56
Velox Paper—1909 Sales—$769.85. Gross profit 25%.		
Net loss for 1 year	152.97	
Net loss for 4 years and 9 months		726.61
Cameras, Outfits and Sundries—1909 Sales—$1724.42. Gross profit 30%, Sundries 33 1-3%.		
Net loss for 1 year	602.15	
Net loss for 4 years and 9 months		2,860.21
Eastman Kodak Chemicals—1909 Sales —$309.01. Gross profit 40%.		
Net loss for 1 year	90.42	
Net loss for 4 years and 9 months		429.49

Stanley Plates—1909 Sales—$4,783.61.		
Gross profit 15%.		
Net loss for 1 year	478.36	
Net loss for 4 years and 9 months		2,272.21
Standard Plates—1909 Sales, $945.32.		
Gross profit 15%.		
Net loss for 1 year	141.80	
Net loss for 4 years and 9 months		673.55
Seed Dry Plates—1909 Sales, $3912.15.		
Gross profit 20%.		
Net loss for 1 year	586.82	
Net loss for 4 years and 9 months		2,787.39
Total net annual loss	$7,021.74	
Total loss for 4 years and 9 months		$33,353.23

(The full year 1909 is used except in the case of Artura paper, which the plaintiff had for only four months of 1910. For comparative sales of old process protrait paper, see pages 184 and 189 of the record, or page 8 hereof.)

In 1909, the plaintiff had 1335 customers, who were professional photographers. In 1910 it had 1975 such customers and in 1911, 2183, showing an increase in the number of customers from 1909 to 1911 of 848, or a 60% increase in numbers. (Pages 195-196 of the record.)

The sales in 1907 to professional photographers were $105,205.13 and only $97,416.86 in 1911. (Page 300 of the record.)

Despite the increased number of customers, the sales to professional photographers continued to decrease each year until 1915, reaching in that year $79,804.22.

The average sales per photographer in 1907 to 1915 were as follows:

1907	$79.00
1909	68.51
1910	48.75
1911	44.62
1914	37.47
1915	36.09

The amount of sales by plaintiff during the period of the suit, of amateur goods to side line houses was shown for each of the years and likewise the sale of mounts to professional photographers was separated from the total sales to such photographers.

The sales to dealers from 1910 to 1915, amounted in the first year to $23,400.08, increasing each year through 1914 to $74,924.31. These sales to dealers were had on a 10% gross profit. Plaintiff had only four dealers in 1909 and they handled mounts. (Page 195 of the record).

The development of this business, that is, sales to dealers was not at the expense of the business with professional photographers, for despite the increase in the former, plaintiff increased the number of professional photographers more than 60% during this period.

That the annual sales to professional photographers should have decreased on an average from $79.00 to $36.09 in 1907 to 1915, is due solely to the monopoly which defendant had on such articles, and the plaintiff's inability to longer supply its trade with such articles was due to the refusal of the defendant to sell the plaintiff such articles.

The verdict was totally inadequate to meet the loss sustained by plaintiff, even though the amount be trebled.

There is not one iota of evidence in the record that the plaintiff was ever a party to any plan or scheme of the de-

fendant to monopolize the photographic trade. The only evidence in the record is that the plaintiff purchased the goods upon the only terms upon which they could be obtained and sought to protect the limited rights which he had under these terms.

E. H. Goodhart testified for the plaintiff that the Eastman Kodak Company never consulted him about creating a monopoly or any scheme it took in securing a monopoly either as to the purchase of a competitor or stock house or dismantling said plant or their raw paper contracts or the terms of sale. They merely gave him the option of purchasing upon these terms or to do without the goods and relied upon the inspection of gum shoe artists to see that their rights were not infracted by them. Not one witness of the defendant testified to the contrary.

Mr. Goodhart testified (page 322 of the record), that the discounts under Eastman were less than the normal discounts and that the only benefit plaintiff got out of the monopoly was to lose business and money, if this is a benefit, that when Eastman acquired a product, they immediately reduced the discount.

These two statements are clearly proven to be true by the loss sustained by plaintiff in its inability to handle Artura Paper when it was an independent concern at a discount of 40% from that Company, and the Eastman discount of 33 1-3% when acquired by that concern.

The Plaintiff in error has treated the Assignments of Error specified in the Brief as raising five questions which he designates, Points One to Five.

We will take them up in the order adopted by the Plaintiff in error. (Defendant below).

Point 1.

THIS POINT DEALS WITH THE QUESTION OF VENUE

The question here presented is, did the District Court acquire jurisdiction of the person of the defendant by service upon the defendant in the district of which it was an inhabitant The answer to this question is determined solely by the fact of whether or not the defendant transacted business in the Northern District of Georgia.

The record shows that Eastman did an enormous interstate business in the State of Georgia, and in the Northren District thereof, as well as an extensive local business. The defendant had one hundred and twenty-six customers in the State, who were dealers (Pages 752-756 of the record), handling kodaks and films, and the defendant distributed its merchandise to professional photographers through the Glenn Photo Stock Company which concern handled the Eastman line exclusively. The entire capital stock of the Glenn Photo-Stock Company was owned by the Eastman Kodak Company of New Jersey. The defendant's salesmen travelled the State; orders were taken from the retail dealers for merchandise, and sent to the Rochester office for acceptance, or to the New York branch office. When they were from regular customers, this branch office filled the orders without reference to the home office. The Eastman Company maintained demonstrators, who resided in Atlanta, Georgia (Pages 774-775 of the record), whose duties were to show both the retail dealers and the consumers how to use defendant's goods, and to convince them of their superiority. These demonstrators accepted orders from photographers and other consumers, and sent them to nearby retailers to be filled. The defendant also had its inspectors, resident in Atlanta, whose duty it was to visit its customers and ascertain if they were complying with the terms of sale, according to which goods manufactured by it could not

be re-sold by its customers except at prices fixed by it, and only to consumers, but not to other dealers; and could not be sold at all in competition with goods placed on the market by other manufacturers. (295 Fed., page 100).

The argument of the defendant and the numerous citations of authority are not in point.

The defendant proceeds upon the theory that the question of venue depends entirely upon whether or not the defendant had in the State of Georgia an Agent of such character as would bind the defendant by service upon such Agent. This was the law prior to the passage of Section 12 of the Clayton Act, October 15th, 1914.

The case of:

The Peoples Tobcaco Company, Ltd.
vs.
American Tobacco Company, 246 U. S. Page 79,

while decided by the Supreme Court March 14th, 1918, was begun in 1912 under the Sherman Act before the passage of the Clayton Act.

Clearly, therefore, this case is only authority as to what was necessary to acquire jurisdiction of the person prior to the passage of the Clayton Act.

We respectfully submit that the question of venue is foreclosed by the very terms of the Clayton Act of October 15th, 1914, 38 Stat. 736 (9 Fed. St. Ann. Page 744) Section 12 thereof, which provides:

> "That any suit, action or proceeding under the anti-trust laws against a **corporation** may be brought, not only in the judicial district whereof it is an inhabitant, but also **in any district wherein it** may be found or

> **transacst business,** and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found." (Bold face ours.)

Obviously this section was passed to enlarge the more restricted provision of Section 7 of the Act of July 2nd, 1890, and the Act of August 27th, 1894, Section 77.

The first of these, Section 7, provides:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found without respect to the amount in controversy and shall recover three-fold the damage by him sustained and the cost of suit, including a reasonable attorney's fees." (26 Stat. L. 210) (Vol. 9, Fed. Stat. Ann. P. 713.)

The other, Section 77, provides:

> "That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by ths Act, may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found, without respect to the amount in controversy and shall recover three-fold the damage by him sustained and the cost of suit, including a reasonable amount as attorney's fees." (28 Stat. L 57, Fed. Stat Ann. Vol. 9 P. 748.)

Under the provision of the two sections conferring jurisdiction on a particular Circuit (now District Courts) in order to establish the venue of such Court in a District, other than that of which the defendant was an inhabitant, it was

necessary that such corporation be found within such District, that is the Corporation should not only be doing business in such District, but should have therein an Agent of such character as would authorize the service of process upon him.

The purpose of the Sherman and Clayton Act was to prevent unlawful trade combinations and monopolies in interstate trade and to compensate for the injury done to a person's business or property by reason of such unlawful trade combinations or monopolies of interstate trade.

It frequently happened that a defendant violating such law and inflicting injury upon the business or property of another by the business done in the district of such person was not subject to suit in such District, because of the absence therein of a representative Agent and the person so injured was compelled to resort to a District remote from his residence for the purpose of seeking redress.

The disparity of position between the litigants was thus, so great that to meet the situation, Section 12 of the Clayton Act was passed. This Section relieved the Plaintiff of having to find a representative Agent if the defendant Corporation was doing business in the District, by providing that where suit was brought in such District, service could be had in the District in which the defendant was an inhabitant or where it could be found.

Two District Courts have been called upon to construe the venue provision in Section 12 of the Clayton Act.

In the first of these:

Frey & Son vs. Cudahy Packing Co., 228 Fed. Page 209

suit was brought against the Cudahy Packing Company in

the District Court of Maryland. The defendant was doing an extensive and continuous interstate business in that District. Service was had upon an alleged Agent of the Corporation. The record is not clear as to whether this was a resident Agent or a representative merely passing though the State.

Judge Rose declined to decide whether or not the Agent was a Representative Agent, service upon whom would bind the Corporation, but stated that under Section 12 of the Clayton Act, quoted above, this question would be rendered immaterial if service were had in the District of which the defendant was an inhabitant. In the body of the opinion, the Court stated:

> "A non-resident corporation may be doing business in a District and therefore theoretically be liable to suit therein, but if it is not represented therein by an Agent upon whom process against it may be legally served, it cannot, against its will be brought into Court. The framers of the Clayton Act, however, have taken care that suits authorized by it shall not be so obstructed. The 12th Section of that statute **provides for the bringing of a Corporation into the Court of any District in which, under that Act, it may be sued,** by service of process upon it in any District of which it is an inhabitant, or wherein it may be found. If the defendant is properly suable in this District, the objection to the representative character of the so called Agent upon whom the process herein was served would not end the suit here. It could have no other effect than to delay the progress of the case until process could be served upon the defendant in the District in which it is an inhabitant." (Bold face ours.) (Page 210.)

And again on Page 211:

> "Congress doubtless meant to facilitate the redress

of wrongs done in violation of the anti-trust Act. It wanted to let a plaintiff sue wherever it was most convenient to him, provided injustice was not done a defendant. The provision in Section 12 for serving process in another District from that in which suit was instituted, itself took out of the plaintiff's way most if not all of the technical obstacles which had formerly obstructed it * * * * * A Corporation may be sued under this Statute where it transacts business. It cannot escape the obligation to respond because no Agent of the rank and charcter qualified to be served for it can there be found. Suit may be there brought and process may be issued to a district in which it cannot deny its liability to service."

The other case was the decision of Judge Newman in the instant case found in 234 Fed. page 955. On page 957, Judge Newman states:

"The conclusion to which I have come is this, that under Section 12 of the Clayton Act, suits may be brought in any judicial district whereof the Corporation is an inhabitant and also any district wherein it may be found, and in addition in any District wherein it transacts business; the process of course must be served in the District of which it is an inhabitant or wherein it may be found. The purpose of the Act was, I think, to give the Courts jurisdiction in any district in the Unitd States where a corporation transacts business, whether in the sense of the decisions it is 'found' there or not, and then that service on it may be perfected in its Home office in the District whereof it is an inhabitant or wherein it may be found; that is, 'found' as provided in the decisions construing that term."

If the business done is of an interstate character, this is

sufficient to authorize service of process, even under the Judicial Code.

> International Harvester Co. vs. Kentucky, 234 U. S. Page 579.

In that case, it was undisputed that the business done was entirely interstate. The Court said on page 587:

> "The contention comes to this, so long as a foreign Corporation engages in interstate commerce only it is immune from the service of process under the laws of the State in which it is carrying on such business. This is indeed, as was said by the Court of Appeals of Kentucky, a novel proposition, and we are unable to find a decision to support it, nor has one been called to our attention."

The Harvester case was cited with approval in the case of

> Davis vs. Farmers' Co-operative Co., 262 U. S. Page 312.

On page 316, the court said:

> "The fact that the business carried on by a corporation is entirely inter-state in character, does not render the corporation immune from the ordinary process of the courts of the State."

In the instant case, suit is based upon a statute relating solely to inter-state commerce or business. Clearly, if the defendant is doing an inter-state business in the district where sued, it is doing business within the meaning of Section 12 of the Clayton Act.

While we cannot concede that the Clayton Act requires a local business rather than an inter-state business to support

the venue, yet the defendant can find no comfort here, for it did an extensive local business in the Northern District of Georgia through its demonstrators, resident in Atlanta in said District. (Record 774-775), sufficient in extent not only to support service of process but to sustain a local tax.

> Northwestern Consolidated Milling Co. vs. Mass., 246 U. S., page 155.

That Congress had the power to confer jurisdiction upon a District Court where the defendant was doing business and provide for service in the district of which it was an inhabitant, or can be found, has been too clearly settled to admit of dispute.

> United States vs. Union Pacific Railway Co., 98 U. S., page 569.

This suit was brought under a statute authorizing suit by the United States in any Circuit Court against the Union Pacific Railway Company, and any person or persons who had subscribed for or received stock in said road, which stock had not been paid for in full, and any who had received as dividend portions of the capital stock or the proceeds of sale thereof. Suit was brought in the Circuit Court of Connecticut against the Rrailroad Company and such other persons as were enumerated in the Act.

The constitutionality of this Act was challenged.

This court in upholding the jurisdiction said on page 604:

> "Whether parties shall be compelled to answer in a Court of the United States wherever they may be served or shall only be bound to appear when found within the District where suit has been brought, is

merely a matter of legislative discretion, which ought to be governed by considerations of convenience, expense, etc., but which when exercised by Congress is controlling on the Courts."

To the same effect is:

United States vs. Congress Construction Co., 222 U. S., Page 199,

in which this Court upheld that provision of the Material Mans Act of August 13, 1894, Chapt. 280, 28 Stat. 278 as amended Feb. 24th, 1905, Chapt. 778, 33 Stat. 811, providing that suit on a bond given under such act can only be brought in the District in which the contract was to be performed

Holding that this Act authorized Courts of such Districts to obtain jurisdiction of the person of the defendant through the service upon them of process in whatever District they may be found.

To the same effect:

Wainwright vs. Penn. Railroad Co., 253 Fed. 459,

which involved the venue of an action against Railroads as fixed by Congress under the Act of March 21st, 1919.

The constitutionality of this Act was challenged.

The Court held that the right to maintain an action in any particular court is always subject to the legislative will, that Congress had uniformly exercised this power by prescribing in what Courts suits may be maintained and in no instance has such an act been held void.

Citing the Union Pacific case supra and the Congress Construction Co. case supra and in addition,

Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186.
Hopkins vs. Ellington, 246 U. S. 25
Ex parte Southwestern Surety Insurance Co, 247 U. S. 19

and in addition the decision in the instant case by Judge Newman as reported in 234 Fed. 955.

That Section 12 of the Clayton Act enlarges the venue and determines whether or not suit can be brought in a particular district Court is pointed out by the Supreme Court of the United States.

General Investment Co. vs. Lakeshore, 260 U. S. Page 261.

This, the defendant will not recognize

In conclusion, we respectfully submit that the lower Court properly upheld its jurisdiction in the instant case, Section 12 of the Clayton Act is conclusive of the question and it is only necessary to see if the elements as defined by that Section exist in the instant case. Was the defendant doing an interstate business in the Northern District of Georgia and was service had in the District whereof the defendant was an inhabitant? Neither proposition is in dispute, consequently there can be no question as to the jurisdiction of the lower Court in this case.

POINT TWO.

THIS POINT DEALS WITH THE SUPPOSED APPLICATION OF THE DOCTRINE OF PARI DELICTO TO THE FACTS OF THIS CASE. AND PROCEEDS UPON THE THEORY THAT BECAUSE THE PLAINTIFF PURCHASED GOODS FROM THE DEFENDANT UNDER A CONTRACT WHICH WAS AN UNDUE RESTRICTION OF TRADE, THAT THE VEN-

DEE WOULD BE A PARTY TO THE ILLEGAL INTENT OF THE VENDOR, DESPITE THE FACT THAT THE VENDOR W LD NOT SELL TO THE VENDEE UPON ANY OTHER TERMS.

Two propositions are asserted as growing out of the supposed application of this doctrine:

First: the plaintiff is debarred from maintaining a suit.

Second: if the plaintiff can maintain a suit, he won't be permitted to prove any damage.

This latter contention is supposed to meet the situation where the act done in furtherance of the general scheme to create or to strengthen a monopoly is directed at the former customer, and shows upon its face that the customer was not a party to this act, but is the victim of such act, such as the refusal upon the part of the vendor to continue selling its former customer, and preventing the customer from thereafter securing goods of the kind and character so monopolized. Then the former customer would not be permitted to prove any damage as a result of such act, because of the illegal intent of the vendor.

In the instant case, it is clearly apparent that the plaintiff was not a party to the illegal refusal on the part of the defendant to sell to the plaintiff, but it is contended nevertheless that the plaintiff should not be permitted to recover because the plaintiff dealt with the defendant during the time that the illegal monopoly was being created.

Needless to say that when this illogical application of the doctrine of pari delicto reached this Honorable Court, it was disposed of in two lines, in the case of:

Charles A. Ramsey vs. Associated Bill Posters,

W. H. Rankin vs. Same Defendant, 260 U. S. page 501, to wit:

"We find no adequate support for the claim that the plaintiffs were parties to the combination of which they now complain."

These cases were dismissed on demurrer by the District Judge and affirmed by the Circuit Court of Appeals of the 2nd Circuit. (271 Fed. P. 140). It was reversed by the Supreme Court of the United States.

The Bill Posters Association had created a monopoly that licensed one Bill Poster in each town or city, prohibited the members from competing with each other, prevented these Bill Posters from accepting business from all advertisers who had given business to a non-member, maintained prices, furnished money to purchase competitors, prohibited the members from accepting work from any advertising solicitors except twelve who were licensed by the Association and prevented manufacturers by threats of withdrawal of business from them from furnishing posters to independent Bill Posters.

The plaintiff were advertising solicitors who were among the twelve that had licenses from the Association. The licenses were cancelled and they brought suit. Pari Delicto did not figure in that case and does not figure in the instant case.

It is surprising that this supposed application of the doctrine of pari delicto should have found the support that it did find in the second and third circuits, particularly as this Court has twice decided that the purchase of goods from one who was engaged in creating an illegal monopoly did not make an illegal relationship and upheld the right of the vendor to collect for the merchandise sold.

Connally vs. Union Pipe Company, 184 U. S. P. 540.
Wilder Mfg. Company vs. Corn Products Company, 236 U S. P. 165.

The case of:

Bluefields Steamship Company, vs. United Fruit Company, 243 Fed. P. 1-18,

is clearly not in point, for there the suit was predicated upon the illegal contract.

The contract itself, the subject matter of the suit was in violation of the Sherman Anti-Trust Act. The plaintiff was claiming rights under this contract.

In the ninth headnote Court said:

"The fact that the plaintiff did not reap the benefit expected, gives it no cause of action."

The case of:

Victor Talking Machine Co. vs. Kemeny, 271 Fed. 810 when properly considered is not in support of the defendant's contention, for in that case the plaintiff in the Lower Court was permitted to recover for the loss sustained by reason of the defendant's act, which prevented the plaintiff from thereafter acquiring the merchandise controlled by the defendant.

Eastman Kodak Company vs. Blackmore, 277 Fed. 694,

is likewise not in point, for in that case, plaintiff brought suit to recover damages for a loss sustained while he was actually handling the defendant's goods. The fact shows that he had been cut off by the Eastman Company in 1902 and reinstated in 1905. He was barred by the statute of limitations from recovering any loss during the period in

which he did not handle the defendant's goods. He sought to show a loss in the period covered by the suit due to the disorganization of his trade in an anterior period when he did not have the line, despite the fact that he had the goods and was able to supply the demand therefor during the period covered by the suit.

Blackmore in 1913, when handling the Eastman line, wrote to the Eastman Company, asking them to continue to do business under the terms of sale.

The case of Tilden vs. Quaker Oats Company, 1 F. (2d) page 160, has no resemblance to the instant case.

Tilden brought suit as receiver for the Great Western Cereal Company. The act complained of, and out of which the loss, it is claimed, arose, was the lawful act of the Great Western Company in selling its property to the Quaker Oats Company. This sale was necessitated by the illegal acts on the part of the Cereal Company's own officers and directors. In the instant case, the refusal of the Kodak Company to sell to the plaintiff was not by the plaintiff's consent. It was not a joint act, but it was a wrongful act on the part of the defendant, and this act caused the damage to the plaintiff.

The defendant makes the assertion that the plaintiff approved of the terms of sale and bases his whole argument of pari delicto thereon, contending that the plaintiff was a party to the intent and plan, and quoted from the testimony of the witness Goodhart (Page 171 of the record) as follows:

> "He explained the Eastman policy, went over it with us, that it was necessary to follow the policy or we could not obtain the goods. He told us that we would have to take them under the terms of sale or we could not get them at all. He gave us no option about it whatever. We bought these goods under the terms of sale."

The witness further stated:

> "To determine whether or not a dealer such as ours was complying with the terms of sale, the Eastman Kodak Company kept check through the demonstrators and salesmen and men who came around and watched you and checked you—we called them gum shoe artists. They would come to our store on an average of once every sixty days, sometimes oftener. They would look to see what merchandise we were handling, look at all of our merchandise. They would investigate our method of advertising and discuss it with us. At one time they made us change our method of doing business." (Page 179 of the record.)

Immediately following (Page 179 to 181) the witness gives in detail this incident where Robinson, one of the gum shoe artists, made him discontinue the premium advertising, which the witness did, rather than lose the Eastman line.

For any one to reach the strained conclusion that the plaintiff acquiesced and approved of the terms of sale by purchasing the Eastman goods upon the only terms upon which it could purchase them it necessarily implies that the purchase of such goods was an illegal act, in other words, that no one has a lawful right to engage in a lawful business.

The Sherman and Clayton Acts are based on the proposition that every one has the lawful right to engage in a lawful business and this has often been stated by the Supreme Court of the United States.

It is significant that this Court called attention to this in the Bill Posters case, supra, in which it disposed of the doctrine of pari delicto, in two lines, to-wit:

> "The fundamental purpose of the Sherman Act was

to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and strain of trade."

The decision in the Ramsey case of course disposes of Point Two of the Defendant's Brief.

We cannot close this portion of the Brief without calling attention to the logic of the defendant's position. If this contention could possibly be sustained, it means that under no circumstances would one violating the Sherman and Clayton Acts be subject to suit by other than the Government, regardless of the amount of loss or damage an individual might have sustained. If the monopoly would not permit a person to go in business, then of couse, this party could not proceed for damages, because the damage would be too uncertain and too speculative. The person who was in business during the creation of the monopoly and who secured his goods at the only available source could not maintain a suit under this theory, because of the fact that an illegal monopoly was being created and he would have no basis to measure his loss, because the profits made were made while the defendant was violating the law.

Clearly this court correctly disposed of this contention when they stated:

"There is no basis for it."

Stating the logic of the defendant's position, the defendant sets up his own wrong to defeat a recovery.

Clearly this proposition violates every rule of law or justice.

The most that could be said on the question of proof of damages is that if the income of the plaintiff was greater under the defendant's monopoly than it otherwise would

have been, such excessive gains should perhaps not be allowed, but only the income on the basis of what it would have been under normal conditions. The Court so charged the Jury. (Page 429-30 of the record.)

This at most was defensive matter and any element of uncertainty as to what the income would have been under normal conditions grows out of the defendant's wrong, not the plaintiff's. If the defendant failed to make this certain, the defendant should not be heard to complain.

This discussion is purely academic, as the defendant offered no such evidence. The plaintiff's testimony was to the contrary. It is true that E. H. Goodhart, witness for the plaintiff testified that Eastman advertised extensively, but the advertisement was of the goods and not of the illegal monopoly.

The whole supposition that the income of the plaintiff was excessive, due to the monopoly falls to the ground when contrasted with the 171% profit of the defendant. (Page 538 of the record.)

POINT THREE

THIS POINT DEALS WITH THE QUESTION OF DAMAGES.

It is important to emphasize that the question does not deal with the fact that loss resulted from the defendant's illegal act, but deals solely with the sufficiency of the evidence to show the extent of such loss.

We believe that the plaintiff does not intend to dispute the right to recover for an injury to an established business, resulting in the loss of income or profits from the operation

of such business. That a recovery can be had in such cases is too well settled to admit of dispute.

Sedgwick on Damages, 9th Edition, Volume 1, page 344, Section 182,

and the cases there cited.

Sutherland on Damages, Volume 3, p. 3207, Sections 867 and 869,

and the cases there cited.

The case of:

Central Coal and Coke Co. vs. Hartman, 111 Fed. 96, has been cited innumerable times by the Federal Courts. In each instance a recovery was allowed for the interruption of an established business, but no recovery permitted when the plaintiff claimed damages because prevented from entering into a business which was not then started.

A few of the cases involving the interruption of an established business are:

Lanier Gas Engine Co. vs. DuBois, 130 Fed. 834, 3rd Circuit.

Hollweg vs. Schaeffer Brokerage Co., 197 Fed. 689, 6th Circuit.

Yates vs. Wyhel Coke Co., 221 Fed. 603-7, 6th Circuit.

Homestead Co. vs. DesMoines Electric Co., 248 Fed. 439, 8th Circuit.

Frey & Son, Inc., vs Welch Grape Juice Co., 240 Fed. 114.

Lincoln vs. Orthwein, 120 Fed. 880, 5th Circuit.

The defendant's contention is that the extent of the dam-

ages was not proven with sufficient accuracy or with absolute certainty.

As stated above, the question deals solely with the sufficiency of the evidence.

Before going into the evidence, it is well to point out that the ruling as to certainty of damages is directed against the uncertainty as to cause, rather than uncertainty as to measure or extent. In other words, the rule against uncertain or contingent damage applies only to such damages as are not the certain result of the act, and not to such as are the certain results but uncertain in amount.

17 Corpus Juris, Sec, 90. P. 756 and cases there cited.

The case of Lincoln vs. Orthwein, 120 Fed. 880, states the rule in this language:

"Here it should be borne in mind that the difficulty of making direct proof springs, like the plaintiff's right to recover the damages, out of the wrongful act of the respondents who should not be suffered to reap advantage from their own wrong by requiring that kind of proof which their action has rendered it impossible or difficult for the plaintiff to obtain*****" (Page 886)

In that case, which involved a breach of contract the plaintiff showed profits he had made up to the time of the breach. The Court held that that was a sufficient basis upon which to determine the damage or loss sustained.

Necessarily had the defendant not monopolized interstate trade in professional photographic supplies and apparatus and illegally refused to sell to the plaintiff, exact figures could be adduced, showing the income which the plaintiff would have received from the sale of said goods during the period covered by the suit.

The inability to produce those figures grows out of the very act of the defendant which is the basis of the suit.

Clearly the inability to produce the figures should not therefore be of advantage to the wrong doer. All that the plaintiff is required to establish with absolute certainty is that the loss resulted from the act complained of. This of course is not in dispute.

When it is once established that damage resulted from the act complained of, then it is only necessary to approximate the extent of the loss or damage with the best evidence obtainable.

Lincoln vs. Orthwein, 120 Fed. 880, 4th H. N.

To show that the business was an established business and the usual profits or income therefrom anterior to the interruption is under all of the authorities sufficient evidence to approximate the extent of the damage, in fact, upon this evidence the July could reasonably conclude that during the period of interruption, the plaintiff would have received the same income that he had received prior thereto.

Cases cited, page 32 of this book.

In the instant case, the suit was brought to recover loss of income to an established business. The business continued in operation throughout the entire period covered by the suit. The loss of income is the loss of profits on sales which the plaintiff could have made during the period covered by the suit except for the defendant's illegal act.

In proving the damages in this case, but two factors must be shown.

FIRST. That a loss of income resulted from the defendant's illegal refusal to sell to the plaintiff.

The evidence is conclusive on this fact and is supported by the verdict of the Jury.

The evidence shows that the plaintiff could not secure goods of the kind and class that it had previously purchased from the defendant after the defendant's refusal to sell to the plaintiff. This was true because the defendant had illegally monopolized the trade in such articles.

It further appeared from the evidence that the plaintiff had an established business in such articles and that this business had been ten years in building. Plaintiff's customers after this act had to purchase these goods from others than the plaintiff.

So much for the fact of loss.

SECOND. The extent of the loss.

As stated above, the previous sales and the previous income would be sufficient evidence to authorize a verdict for the plaintiff and form the basis for the Jury to conclude that the same income would have been realized during the period of the suit.

Now we come to an analysis of the evidence.

The sales were detailed for a period of four years prior to the defendant's refusal to sell to the plaintiff. The gross profits on such sales were likewise shown. Plaintiff, of course, was not entitled to recover the gross profits. This would violate the principle of indemnity. The plaintiff could only recover the gross profit or income less such items of expense as were saved to it by reason of not actually making these sales.

The evidence shows that the plaintiff continued its business during the entire period covered by the suit, conse-

quently it still had the items of general expense, incident to carying on its business, such as administrative, organization and selling expenses. In fact, the evidence showed that the plaintiff continued to travel the territory and that his salesmen solicited orders continuously throughout this territory and from the plaintiff's regular trade.

The evidence shows that the plaintiff in continuing the operation of its business still had every expense incident thereto and incident to a sale of the goods which it could no longer obtain, except the actual expenses incident to handling these goods through its established business. This was detailed in the evidence and was shown to be 5% of the selling price. This is 6 6-10% of the cost price and represented merely the handling cost and the additional capital investment.

Furthermore, the evidence shows that the sales to professional photographers during the four-year period prior to the suit were made to 1335 professional photographer customers, but that during the two years of the suit, the plaintiff had incresaed its customers from this number to 2183 (Page 195 of the record.)

Clearly this evidence more than supports the deduction that the plaintiff would have sold the same amount of goods during the period covered by the suit that it did prior thereto, when during the period of the suit, plaintiff had increased its number of customers 60%.

Furthermore, the evidence shows that the plaintiff's sales per photographer dropped from $79.00 prior to the period covered by the suit to $36.09 per photographer during that period.

There was direct testimony that the plaintiff could not supply its customers more than 25% in kind and value of

the articles consumed by them in the operation of their studios. Surely this evidence was more than substantial data from which the extent of the damage could reasonably be inferred or determined by the Jury.

The verdict was in no sense commensurate with the extent of the loss sustained, even though the amount be trebled.

This is true not even considering that the plaintiff's business was a growing business, increasing from year to year in the number of its customers.

> Frey & Son, Inc., vs. Welch Grape Juice Co., 240 Fed. 114.

The defendant insists that all this evidence be disregarded and that the total annual sales of the plaintiff before the injury be compared with the total annual sales during the period covered by the suit, and then permit the defendant to escape the overwhelming logic of the plaintiff's case.

The defendant, in effect, says: "Ignore the fact that the plaintiff could no longer supply its established trade with a majority of the useful and necessary articles used by such trade and consider the fact that the plaintiff had increased its number of customers from 1335 to 2183 and give me the benefit of the total sales to the 2183 photographers as contrasted to the sales to the lesser number, and do this as a matter of law."

There is no casual relation between the defendant's refusal to supply the plaintiff with its merchandise and the growth of the plaintiff's business, as evidenced by the increase in the number of customers. Manifestly, this result does not follow as a matter of law.

The defendant, in effect, says: "Ignore the fact that the

plaintiff's sales per customer decreased from $79.00 to $36.09 per photographer and ignore the fact that during the period covered by the suit that the plaintiff's business was operated at only 50% of its capacity, but take into consideration that the ratio of expense during the two comparative periods remains substantially the same, although both the plaintiff's witnesses and the defendant's witness, Mr. H. D. Haight, testified that the expense of selling a complete line over an incomplete line under this situation would entail no additional cost other than the cost incident to handling such additional merchandise. (Page 382 of the record.)

It ought to need no testimony to call attention to the fact that if the volume of sales is increased without increasing the "going concern" charges, that the ratio of net profit is greater upon the increase than upon the former business.

The defendant says that the plaintiff, after being cut off by the defendant opened up another department, made more money and had more expenses and had more sales than prior thereto and again asked that the total figures during the two periods be contrasted, although the evidence is that the sales of amateur goods to retail dealers was not affected by the defendant's act, and that this business was complementary to the sales to professional photographers.

There is no inconsistency between the two departments. Both were handled like a jobbing business through salesmen. The plaintiff not only testified to this, but this is the testimony of the defendant's witness, Mr. H. D. Haight. (Page 383 and 384 of the record.)

The merchandise sold to professional photographers and that sold to side line houses for resale to amateurs were distinctive merchandise. It is true that the sale of Eastman goods to dealers had been controlled by them, but this was

due to the restrictions placed upon the stockhouses by Eastman and not to any inconsistency in the two departments.

That the two would develop side by side is shown by the fact that while the number of professional photographers increased from 1335 to 2183, the number of dealers increased from four in 1909 to 91 in 1911.

The sales to dealers during the period covered by the suit increased from $23,400.08 in 1910 to $74,924.31 in 1914.

The loss sustained by the plaintiff was clearly developed both as to nature and extent. The plaintiff with an established organization was a "going concern" with a demand for certain articles which it could not supply despite the fact that the plaintiff had every "going concern" expense incident to supplying such articles. The plaintiff lost the gross income on such articles less such items of expense as the plaintiff saved by reason of not handling these goods. These items of expense were both detailed by the witness, Goodhart, and by Mr. Haight.

We respectfully submit that taking the facts of this case and analyzing the evidence that it shows with unusual certainty, the extent of the loss that the plaintiff sustained and that the Trial Judge in the charge on the subject of uncertainty gave the defendant a more favorable charge than to which it was entitled.

POINT FOUR

The defendant tendered a number of issues in the Court below and all were submitted to the Jury and decided adversely to the defendant.

The Court charged the Jury that the defendant had a right to select its customers and if the refusal to sell the

plaintiff was an exercise of this right, the plaintiff could not complain and further charged as follows:

> "Or even, if knowing that they (plaintiff) were dealing with a competing Company, and they did not care to have the same man selling their goods who was selling competing goods, if there was nothing more to it than that, they could decline to sell their goods to the plaintiff at a discount or any other way."

As a matter of fact, the defendant did not in the Lower Court tender this issue, because the defendant could not claim that it had knowledge of the Ansco Contract at the time it discontinued selling the plaintiff and there is not one iota of evidence in the record of such knowledge.

If the Court will refer to the defendant's amendment (page 782 of the record) it will see that the issue tendered was whether or not the plaintiff had discontinued dealing with the defendant.

The amendment uses this language, after referring to the Ansco Contract, to-wit:

> "As a result of this business arrangement, defendant avers that the plaintiff voluntarily and of his own motion in the exercise of its business judgment terminated its relation with the defendant as a distributor of the defendant's products."

Surely in the state of the pleadings and evidence defendant has no ground for complaint on this issue. Whether or not the defendant discontinued dealing with the plaintiff as a part of its monopolistic plan or scheme or for some innocent reason was a question of fact, and this question of fact was decided adversely to the defendant.

Even by the wildest stretch of the imagination it could

not be contended that the plaintiff terminated its relations with the defendant.

Written orders for the defendant's merchandise were sent in and these orders rejected in writing. (Pages 165-9 of the record.) Subsequent to this refusal to deal with the plaintiff, the plaintiff attempted to purchase goods from the defendant, but without success. (Page 272 of the record.)

The evidence is overwhelming that the defendant discontinued dealing with the plaintiff for an illegal purpose. Defendant had just acquired two competing stock houses in Atlanta and one in New Orleans. The plaintiff had just taken on a line of amateur goods to sell to retail dealers. This, it is true, was stepping on the defendant's toes, as the defendant had rigorously maintained a monopoly in distributing its products to the retail dealers.

The evidence shows that the defendant, by refusing to sell to the plaintiff would control the business of selling to professional photographers through its subsidiary, the Glenn Photo Stock Company. If the plaintiff could be put out of business, the defendant would strengthen its monopoly both in the distribution of pressional apparatus and supplies and of amateur goods.

The defendant undertook to purchase the business of the plaintiff (Pages 154-64 of the record) and hired its head salesman and other employees (Page 164 of the record), then it refused to sell the plaintiff its goods.

That subsequent refusal of the defendant to sell to the plaintiff was all part and parcel of the plan of the defendant to monopolize the trade in photographic supplies is manifest, and such was found to be the fact by the jury, based upon the conclusive evidence before them.

See the testimony of Walter McElreath (pages 332-6 of the record.)

As a matter of fact, not one iota of evidence was introduced by the defendant as to why they refused to sell to the plaintiff.

The final judgment was totally inadequate to compensate plaintiff for the loss sustained by reason of the defendant's unlawful act, and we respectfully submit that the judgment of the lower court should be affirmed.

KING, SPALDING, MACDOUGALD & SIBLEY,

FOWLER & FOWLER,

Attorneys for Defendant-in-Error.

J. A. Fowler,
Daniel MacDougald,
Of Counsel.